Supreme Court, U. S.
FILED
[illegible] 14 2000
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No. 99-1060

IN THE

Supreme Court of the United States

LOCKHEED MISSILES AND SPACE COMPANY, INC.

Petitioner,

v.

UNITED STATES OF AMERICA EX REL. MARGARET A. NEWSHAM AND MARTIN OVERBEEK BLOEM,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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Respondents Newsham and Bloem contend that neither the False Claims Act (FCA) issues nor the anti-SLAPP issues raised in the Petition warrant review. They are wrong.

I. THE RETROACTIVITY ISSUE WARRANTS REVIEW.

Respondents argue that the "factual setting in which Petitioner here urges the existence of a conflict is itself unique, non-recurring, and increasingly unimportant with the passage of time." Opp. at 3. Yet, the retroactivity issue arose in a similar factual setting in at least two other cases addressed by the circuit courts in recent years. *See United States ex rel. Lujan v. Hughes Aircraft Company*, 162 F.3d 1027 (9th Cir. 1998) and *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402 (3rd Cir. 1999).

Moreover, while the temporal reach of the 1986 FCA, 31 U.S.C. §§ 3729-3733 (1986), will, admittedly, become less significant with the passage of time, the question of whether a new federal statute should be applied in a pending case is a recurring one.[1] Just last year, this Court resolved an inter-circuit conflict that postdated both *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), regarding whether a new attorneys' fees statute applied to pending cases. *See Martin v. Hadix*, 119 S. Ct. 1998, 2003 (1999). Thus, notwithstanding the retroactivity principles set forth in *Landgraf* and *Schumer*, the lower courts continue to struggle with the issue of retroactivity. Consequently, further guidance by this Court will provide needed assistance

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[1] Despite the 1986 FCA's 10 year statute-of-limitations, it is possible that the retroactivity issue will resurface in a *qui tam* action filed in the future. For example, if a would-be relator filed a *qui tam* action alleging that a contractor was mischarging the Government in the year 2000 and it turned out that the Government knew of the charging practices at issue since at least 1985, the statute-of-limitations would not bar the action, but the principles against retroactivity would.

to the lower courts, particularly with respect to determining which of two or more competing events are to be treated as the "relevant events" for assessing retroactivity.[2]

The Ninth Circuit's decision in *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810 (9th Cir. 1995) (*Anderson I*), *cert. denied*, 516 U.S. 1043 (1996) is in direct conflict with the decision below and with the Third Circuit's decision in *Cantekin* on the precise issue that was explicitly left unresolved in *Schumer*: "which of [ ] two events constitutes the relevant conduct for purposes of [the] retroactivity analysis." *Schumer*, 520 U.S. at 946 n.4. Nevertheless, respondents assert that there is no conflict because the *Anderson I* decision was "vitiated by *Schumer* and is no longer followed by the Ninth Circuit." Opp. at 4.

Respondents are wrong on both counts. First, although *Anderson I* predates *Schumer*, it is based on the same retroactivity principles that this Court applied in *Schumer*.[3] *Anderson I* applied the *Landgraf* analysis in determining that disclosure to the Government is a relevant event for purposes of retroactivity. *Anderson I*, 52 F.3d at 812-815. Nothing in *Schumer* undermines that conclusion. In fact, for the reasons

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[2] The different results reached by the concurring and dissenting opinions in *Martin* highlight the importance of choosing the correct reference point for determining retroactivity. *Compare Martin*, 119 S. Ct. at 2008-2009 (Scalia, J., concurring) (stating that the doing of legal work for which attorneys' fees are to be paid is the relevant retroactivity event and concluding that work performed after effective date of new attorneys' fee statute should be reimbursed pursuant to new statute) *with Martin*, 119 S. Ct. at 2011-2012 (Ginsburg, J., concurring in part and dissenting in part) (stating that the attorney's undertaking to represent client is the relevant retroactivity event and concluding that work performed after effective date of new attorneys' fee statute should be reimbursed pursuant to earlier attorneys' fees statute that was in effect at time representation was undertaken).

[3] Respondents themselves recognize that *Schumer* did not change the law; rather, it merely applied the general retroactivity principles set forth in *Landgraf* to the jurisdictional provision in the 1986 FCA. Opp. at 3-4.

explained in the Petition, at 12, and in the Brief of *Amicus Curiae* Chamber of Commerce, at 3-5, *Schumer* supports it. That fact is underscored by *Anderson II*, wherein the Ninth Circuit reaffirmed its holding in *Anderson I* after *Schumer* was decided. *United States ex rel. Anderson v. Northern Telecom, Inc.*, No. 96-36152, 1998 WL 141179, at *3 (9th Cir. March 27, 1998) (*Anderson II*) (unpublished opinion).[4] Second, the Ninth Circuit has not overruled *Anderson I*. Neither *Lujan* nor the decision below is an *en banc* decision. Thus, the intra-circuit conflict is genuine.

The mere fact that the Third Circuit declined to follow the Ninth Circuit's decision in *Anderson I* does not eliminate that conflict as respondents suggest. Instead, it affirms that there is a conflict and shows that there is a need for further guidance in this area of the law.

Furthermore, if the Court grants *certiorari* on the "public disclosure" and "original source" issues, it should first decide whether the 1986 FCA applies to this case. Thus, the retroactivity issue not only merits review in its own right, but also merits review in connection with the statutory issues discussed below.[5]

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[4] Contrary to respondents' assertion, Opp. at 9 n.8, the fact that *Anderson II* was not published is of no moment here.

[5] There are more factors weighing in favor of review here than an intra-circuit conflict. Therefore, to the extent that *Davis v. United States*, 417 U.S. 333, 340 (1974), suggests that an intra-circuit conflict is in itself an improper basis on which to grant review, it is inapposite. *See, e.g., John Hancock Mut. Life Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939) (granting *certiorari* because of an intra-circuit conflict *and* the importance of the question at issue). Moreover, *Davis* states only a general, not an absolute, rule. *Cf. Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (granting *certiorari* to resolve intra-circuit conflict).

II. THE "PUBLIC DISCLOSURE" AND "ORIGINAL SOURCE" ISSUES WARRANT REVIEW.

Lockheed's Petition presents the opportunity to resolve the most heavily disputed legal question arising under the 1986 FCA Amendments – who is a proper *qui tam* relator. Respondents downplay the significance of the Ninth Circuit's finding upholding jurisdiction over their post-1986 claims. They assert that Lockheed presents merely its disagreement with *factual* determinations rendered by the courts below and does not present any broadly applicable question of law, let alone a split of authority.

To the contrary, the Petition presents the same jurisdictional question upon which this Court granted *certiorari* but ultimately did not reach in *Schumer*: Is the Government's disclosure of an audit report to the audited company a "public" disclosure? The Petition also presents the questions of whether *qui tam* relators can base allegations in an amended complaint on Government audit reports obtained during discovery and whether they can be deemed to be "original sources" of such information. The Court's interpretation and resolution of the circuit split on these questions is of equal if not greater importance today than it was when the Court granted *certiorari* in *Schumer*.

Respondents' characterization of these issues as presenting only a factual dispute is disingenuous. First, they assert that the "public disclosure" issue "was not squarely decided by the court below," as if to suggest that the issue is not ripe for this Court's determination. Opp. at 10. On the contrary, the Ninth Circuit upheld jurisdiction as a matter of law under the amended FCA, and its determination is properly subject to review, particularly in light of the conflict the decision presents.

In finding that there was no evidence of a public disclosure, the Ninth Circuit ignored the fact that the Government had disclosed its audit report to Lockheed prior to the filing of this action. Pet. at 19, n.15. The court also ignored respondents' admissions that they obtained some of their information about their post-1986 claims – the claims

that form the basis of their amended complaint - from the Government's audit reports which were disclosed to them during the course of discovery. Pet. at 17. Respondents' opposition does not dispute that these disclosures occurred, or that their amended complaint is based at least in part on such disclosures.

The court's failure to account for these disclosures is tantamount to holding that neither event constituted a public disclosure – a holding squarely at odds with the decisions of other circuits cited in the Petition.[6] Respondents attempt to distinguish those cases as presenting "different facts and different issues" from the "private communication of a non-public audit report" which occurred here. Opp. at 11. Respondents' conclusory assertions fail to draw any meaningful distinction. They assert that the relators in *Stinson* and *Kreindler* were barred because they were "lawyers who learned about the alleged frauds only through their representation of clients." Opp. at 11.[7] Actually the relators in those cases were barred simply because the disclosure of information to them during discovery in a civil case was held to be a public disclosure.

Respondents further argue that the Government's earlier disclosure of its audit report to Lockheed was insufficient to constitute a "public disclosure" because, unlike *Doe*, the Government's disclosure was not made throughout the company. However, *Doe*, which involved the Government's disclosure of possible wrongdoing to company employees, held that such a disclosure need not be "widespread." 960

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[6] *United States ex rel. Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2nd Cir), *cert. denied*, 508 U.S. 973 (1993); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2nd Cir. 1992); *United States ex rel. Stinson et al. v. Prudential Ins. Co.*, 944 F.2d 1149 (3rd Cir. 1991).

[7] This represents another classic "distinction without a difference." Ironically, it was respondents' counsel, not respondents, who obtained the products of discovery in this case.

F.2d at 323. Indeed, other courts have further clarified that a public disclosure can occur even when the disclosure is limited to one person. *See United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1005 (10th Cir. 1996) (a public disclosure occurs whenever the requisite disclosure is made "to any member of the public not previously informed thereof"); *United States ex rel. Mistick PBT v. Pittsburgh Housing Authority*, 186 F.3d 376, 383 (3rd Cir. 1999) (information obtained under the Freedom of Information Act is a public disclosure once it is received by the individual requester), *pet'n for cert. filed*, 68 U.S.L.W. 3391 (U.S. Dec. 8, 1999) (No. 99-969).

The Ninth Circuit's decision on public disclosure in this case is devoid of any analysis, and the precise basis for its decision is confusing, as noted in the Petition.[8] This ambiguity, however, does not immunize the decision from review, particularly where the legal conclusion is at odds with the holdings of other circuits.

With regard to whether respondents qualify as original sources of the publicly disclosed information, respondents suggest that an original source is any "whistleblowing insider." Opp. at 12. While cases have used that term to describe typical *qui tam* relators, the statutory definition of an "original source" requires much more, as set forth in the cases cited in the Petition at 21-23. Lockheed asserted that respondents could not possibly have supplied information to the Government in 1984 about conduct that allegedly

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[8] The Ninth Circuit's confusion on the public disclosure issue is in part a result of its failure to adhere to the structure of the statute. The court correctly noted that the statute requires determination of whether there has been a public disclosure *before* deciding whether the relator is an original source of the publicly disclosed information. App. at 14a. *See also Burns ex rel. United States v. A.D. Roe Co.*, 186 F.3d 717, 722 (6th Cir. 1999). However, by deciding that the respondents are original sources without regard to whether there has been a public disclosure, the court put the cart before the horse.

occurred after 1986, particularly because Newsham's employment was terminated in 1984. Further, respondents admitted that they did not learn of the basis for some their post-1986 claims until after 1988 when they obtained Government audit reports in discovery.

Respondents offer only the conclusory assertion that their knowledge of *some* of the relevant facts did not originate in the governmental documents. However, their admission that they did not disclose (because they did not know) how or whether the alleged idle and nonproductive time was charged (Opp. at 2) belies that assertion. Further, their argument that they can maintain their post-1986 claims simply because they possessed *some* of the information on which those claims are based ignores the decisions of other circuits described in the Petition, at 21-23, which require that relators "directly observe" the events rather than present secondhand, derivative information.

Finally, respondents state that both courts below rendered factual findings that the Government audit reports concerning post-1986 conduct resulted from respondents' disclosures of their "direct and independent knowledge." Opp. at 12. In fact, the issue of whether respondents were original sources was never presented to the district court; therefore, that court never rendered any findings pertaining to whether respondents qualified as original sources under the amended jurisdictional provision. And, while the Ninth Circuit erroneously concluded that "it is undisputed that the relators directly observed the non-productive labor and improper billing that form the heart of their allegations" (App. at 14a), the Ninth Circuit never gave Lockheed an opportunity to dispute respondents' alleged "direct knowledge" of their post-1986 claims.[9]

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[9] As noted in the Petition, the Ninth Circuit should have remanded the questions concerning public disclosure/original source to the district court, which never had the opportunity to render any factual

(Footnote cont'd on next page)

III. THE ANTI-SLAPP ISSUE WARRANTS REVIEW.

Respondents contend that the question of whether a state's procedures for a special motion to strike apply in federal court "is a unique one that has never arisen before and is likely to remain rare." Opp. at 4-5. Respondents' position disregards the growing number of state anti-SLAPP statutes that provide for a special motion to strike and the resulting growing number of special motions to strike that are now brought in federal courts.[10] Although petitioner is not aware of any circuit court decisions that address this issue, special motions to strike have, contrary to respondents' suggestion, been heard in more than one federal district court. Some of these decisions squarely conflict with the Ninth Circuit's decision here. *See e.g.*, *Baker v. Coxe*, 940 F. Supp. 409, 417 (D. Mass. 1996) (denying special motion to strike, finding that to the extent that the special motion to strike procedures impose additional procedures, they do not trump Fed. R. Civ. P. 12(b)(6)); *see also*, *Pepsi-Cola Co. v. Rhode Island Carpenters Dist. Council*, 962 F. Supp. 266, 284 (D. R.I. 1997) (dismissing Anti-SLAPP counterclaim as preempted by the National Labor Relations Act).

Even within California, application of the state special motion-to-strike procedures in federal court is not unique. At least four district courts in California have applied the Ninth Circuit's decision in addressing special motions to strike. *See Metabolife International, Inc. v. Wornick*, 72 F.

(Footnote cont'd from previous page.)

determination on these issues. Respondents do not dispute Lockheed's contention that remand on these issues would have been the appropriate course. Because the Ninth Circuit, instead, issued a published decision conflicting with other circuit-court decisions on these issues, review by this Court is warranted.

[10] As addressed in the Brief of *Amicus Curiae*, eleven states have enacted anti-SLAPP statutes similar to California's and nine additional states are considering enacting such legislation. *Amicus* Brief at 19. Thus, this issue is not confined to California or to the Ninth Circuit.

Supp. 2d 1160, 1165-1166 (S.D. Cal. 1999) (granting special motion to strike based on legal defenses and specifically declining to weigh evidence to determine if plaintiff established a prima facie case because the court had stayed all discovery pursuant to the statute); *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1111 (N.D. Cal. 1999) (denying plaintiff's request for additional discovery to support allegations and granting special motion to strike); *Rogers v. Home Shopping Network*, 57 F. Supp. 2d 973, 980-82, 985 (C.D. Cal. 1999) (finding the expedited procedures used to test the plaintiff's evidence before conducting discovery would collide with Fed. R. Civ. P. 56 and continuing the hearing on the special motion to strike until discovery is complete); and *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F. Supp. 2d 1127, 1130 (N.D. Cal 1999) (concluding that the special motion to strike procedures do not apply to federal question claims that are asserted in the same action as state law claims).

Respondents also contend that this issue is not ripe for review because the district court has not yet entered, and the Ninth Circuit has not yet reviewed, a final order on respondents' anti-SLAPP motion. Opp. at 14. Yet, this Court has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals pursuant to 28 U.S.C. §1254(1) (1993). Review is warranted here because several special motions to strike brought in federal district courts have already been impacted by the Ninth Circuit's decision. Additionally, application of a state's special motion to strike procedures in federal court implicates the broader question of law about when state procedural rules apply in federal court. In that regard, the Ninth Circuit's decision conflicts with the Supreme Court's decisions in *Hanna v. Plumer*, 380 U.S. 460, 472 (1965), *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-750 (1980), and *Burlington N. R.R. v. Woods*, 480 U.S. 1, 6 (1987). See Petition at 24-28. In sum, the circumstances under which a state procedural rule can be applied in federal court is an important question of federal procedure that merits this Court's deliberation.

IV. AT A MINIMUM, THIS COURT SHOULD HOLD THIS PETITION PENDING ITS DECISION IN *STEVENS* REGARDING THE CONSTITUTIONALITY OF THE FCA'S *QUI TAM* PROVISIONS.

While respondents recognize that this Court's decision in *Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, No. 98-1828, 1999 WL 1045146 (Nov. 19, 1999) could be dispositive here, they urge the Court to send this case back to the district court immediately. Opp. at 17. Balancing respondents' desire to avoid a relatively modest delay to litigate a case that may soon be deemed unconstitutional against petitioner's interest in preventing great (and possibly avoidable) expenses and the district court's interest in preserving scarce judicial resources, however, weighs in favor of holding this petition pending a decision in *Stevens*.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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